Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1997

The Corner Pocket of Sioux Falls, Inc. et al.,
Petitioners,

v.

Video Lottery Technologies, Inc., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In order to resist a motion for summary judgment in a case alleging a price-fixing conspiracy, where the alleged conspirators had a rational economic motive to conspire, does *Matsushita* either require a plaintiff to introduce evidence proving that the alleged conspirators did not act independently or otherwise impose heightened requirements of proof on the plaintiff?

2. In deciding a motion for summary judgment in a Section 1 price-fixing case, may a court ignore evidence that the purported justification for a defendant's allegedly anticompetitive sales policy was a sham, developed and implemented in concert with other defendants, and instead grant summary judgment for the defendant based solely upon the defendant's uncorroborated self-serving testimony to the contrary?

LIST OF PARTIES

Petitioners (plaintiffs below) are: (1) The Corner Pocket of Sioux Falls, Inc., d/b/a The Pocket; (2) Robert Remacle, d/b/a Ralph's Bar, County Seat, and R & R Vending; (3) G & T Gaming, Inc.; (4) R.E.L. Trust, R.E.L. Trustee Corp., Trustee; and (5) J. Clifford Foley, d/b/a Foley's Bar, on behalf of themselves and on behalf of all other persons similarly situated.

Respondents (defendants below) are: (1) Video Lottery Technologies, Inc.; (2) Music and Vending Association; (3) James Koehler and Tim Hofer, d/b/a Hub Music and Vending; (4) Leo Freidel; (5) Jerry Freidel; (6) Kerry Freidel; (7) Freidel's Music and Recreation, Inc.; (8) Elroy G. Gruenewald; (9) David A. Backlund; (10) D & E Music and Vending, Inc.; (11) Robert J. Correa; (12) Hasvold Vending Company; (13) Dean Schroeder; (14) Musivend Enterprises, Inc.; (15) W.C. "Buzz" Oligmiller; (16) Rushmore Amusement, Inc.; (17) Michael J. Trucano; and (18) Automatic Vendors, Inc.

Pursuant to Sup. Ct. R. 29.6, the following Petitioners are corporations: (1) Corner Pocket of Sioux Falls, Inc.; (2) G & T Gaming, Inc.; and (3) R.E.L. Trust, R.E.L. Trustee Corp., Trustee. The Court is advised that none of the corporate petitioners has a parent company or any subsidiary.

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Petitioners The Corner Pocket of Sioux Falls, Inc., et al., respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 123 F.3d 1107 (8th Cir. 1997), and is reprinted in the Appendix hereto at A-1 - A-13. The opinion of the District Court is reported at 1996 WL 924679 (D.S.D. Nov. 6, 1996), and is reprinted in App. at B-1 - B-33. The Order of the Court of Appeals denying the petition and suggestion for rehearing *en banc* is unreported, and is reprinted in App. at C-1.

JURISDICTION

The decision of the Court of Appeals of which review is sought was rendered in an opinion filed on August 29, 1997. (A-1 - A-13). The Order of the Court of Appeals denying the timely filed petition for rehearing and suggestion for rehearing *en banc* was filed September 29, 1997. (C-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2).

STATUTORY PROVISIONS INVOLVED

This case was brought pursuant to the Sherman Act, 15 U.S.C. § 1, which states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any

> combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000 or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1.

This case also was brought pursuant to the Clayton Act, 15 U.S.C. §§ 15 and 26, which state:

> **§ 15. Suits by person injured**
>
> **(a) Amount of recovery; prejudgment interest**
>
> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only --

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if --

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28,

immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section --

(1) the term "commercial activity" shall have the meaning given it in section 1603(c) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

15 U.S.C. § 15.

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26.

STATEMENT OF THE CASE

A. The Facts Material To This Court's Consideration Of The Questions Presented

This Petition presents important questions involving the standards to be applied in resolving summary judgment motions in antitrust actions.

In 1986, the South Dakota Constitution was amended to authorize a state lottery or video games of chance, and on March 1, 1989, South Dakota enacted a statutory scheme authorizing video lottery games.[1] Pursuant to the statutory scheme, the video lottery business consists of, and provides for licensing of, (1) manufacturers, which produce video lottery machines for sale in South Dakota; (2) distributors, which sell video lottery machines or associated equipment; (3) operators, which purchase video lottery machines and place them for public use; and (4) establishments, where video lottery machines are located. South Dakota Codified Laws ("S.D.C.L.") § 42-7A-6 (15-17). Only licensed manufacturers and distributors may sell video lottery machines. S.D.C.L. § 42-7A-1(15-16). Only licensed operators may own video lottery machines. S.D.C.L. § 42-7A-42. Licensed operators may place video lottery machines only in licensed establishments. Licensed establishments may purchase and own video lottery machines only if they have obtained an operator license. S.D.C.L. § 42-7A-42. Thus, under South Dakota law, licensed video lottery machine manufacturers (or their licensed distributors) sell video lottery machines to licensed operators, which either place the machines in their own establishments or lease space in a licensed establishment

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[1] Video lottery games are essentially poker games played on a video terminal located in establishments that are licensed to sell alcoholic beverages.

to place a video lottery machine. Where a licensed operator leases space for placement of video lottery machines, the licensed establishment receives a share of the profits from the machine, called a "split." The State of South Dakota also receives a share of the profits generated from video lottery machines in the form of a tax on net revenues.[2]

According to petitioners' evidence, by October 16, 1989, the time video lottery actually started in South Dakota, it already had a dominant manufacturer, respondent Video Lottery Technologies, Inc. ("VLT"), and a core of operators, all members of the Music and Vending Association ("MVA"), that virtually controlled who could obtain video lottery machines manufactured by VLT ("VLCs"), how they could obtain them, and at what price. By start-up, or shortly thereafter, the core operators had effectively divided the State of South Dakota, allocating exclusive territory to each operator for the purposes of conducting video lottery business. The video lottery territories allocated to each operator virtually mirrored the territories these operators had established during their years as distributors of coin-operated games.[3] Respondent operators who wished to expand their video lottery business territories were not permitted to do so.[4] Although the video lottery business is highly profitable, MVA

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[2] Video Lottery now generates revenues of approximately $200,000,000 a year in South Dakota, of which the state's "take" is now 50%.

[3] The coin-operated games consisted of pool tables, pinball machines and similar games placed in bars. Whether these coin-operated-games territories were territories themselves subject to an illegal allocation is not directly at issue in this action.

[4] Some "cheating" did occur. For example, at least two respondents attempted to circumvent the imposed territorial restrictions by creating another company with a figurehead owner in order to hide the true ownership and allow them to solicit accounts in another respondent's territory.

members agreed that they would not solicit or service accounts in another MVA member's territory. Therefore, to obtain a VLC, establishments were forced to deal with the one MVA member in their area and pay the 50/50 split the MVA members had conspired to impose.

VLT enforced the operators' territory cartel by generally refusing to sell VLCs to the cartel members' competitors (who might place them at splits more favorable to establishments) and by absolutely refusing to sell VLCs to establishments themselves (who could then retain 100% of the split). Respondent operators also agreed with VLT not to allow VLCs to be resold[5] to establishments and not to place machines at splits that were overly generous to licensed establishments, and VLT agreed not to sell to operators who did so.

In addition, the MVA operators (including respondents) agreed with each other and with VLT to fix the price of placing VLCs in licensed establishments. Beginning with a proposed form contract that incorporated a suggested 40/60 split of profits (40% to licensed establishment, 60% to operator), the MVA operators ultimately decided to use a 50/50 split for virtually all of their customers.

B. The Proceedings Below

On June 7, 1994, petitioners initiated this class action under the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. §§ 15 and 26, in the United States District Court for the District of South Dakota. Petitioners, licensed operators that were unable to purchase VLCs, and licensed establishments that were unable to purchase VLCs and that

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[5] Although operators could not "sell" VLCs themselves, they could transfer ownership to an appropriate establishment through any licensed distributor.

leased VLCs from respondents, alleged that respondents conspired to fix the price for leasing space for the placement of VLCs, to divide and allocate sales territories within the State of South Dakota, and to restrict or eliminate competition in the sale or lease of VLCs, in part by refusing to deal with anyone other than members of respondent Music and Vending Association ("MVA") or operators approved by the MVA in the sale of VLCs.

On January 9, 1995, the District Court (Piersol, J.) dismissed petitioners' rule of reason claim (for failure to plead injury to competition), but otherwise denied a motion to dismiss filed by respondents. On April 12, 1996, the District Court (Piersol, J.) granted petitioners' motion to amend (allowing, among other amendments, a restated rule of reason claim) and also certified a class consisting of:

> all persons, firms, corporations, or other entities of any nature who were "video machine operators" as defined by S.D.C.L. § 42-7A-1(17), or "licensed establishments" as defined by S.D.C.L. § 42-7A-1(6), or both, and to whom VLT refused to sell VLCs on one or more occasion during the relevant period or who leased space to one or more defendants for the placement of one or more VLCs by one or more defendants, or both, excluding defendants, their officers, directors, affiliates and co-conspirators.

The Corner Pocket of Sioux Falls, Inc., et al. v. Video Lottery Technologies, Inc., et al., Civ. No. 94-1019, slip op. at 20-21 (D.S.D. Apr. 12, 1996).

On April 18, 1996, the case was transferred to the Honorable Richard H. Battey, Chief Judge, United States District Court for the District of South Dakota, Western Division. On November 6, 1996, the District Court (Battey, C.J.), adopting a broad interpretation of this Court's opinion in

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), granted respondents' motion for summary judgment, finding that petitioners had failed to establish that a conspiracy existed.

On appeal, the Court of Appeals for the Eighth Circuit affirmed. The Court of Appeals rejected the interpretation of this Court's decision in *Matsushita* adopted by the Third and Ninth Circuits, which does not require a higher standard of proof when the conspiracy makes economic sense. Instead, the Eighth Circuit rejected this interpretation, claiming that ". . . we are among the majority of courts . . . who read *Matsushita* more broadly." (A-3). The Eighth Circuit also approved the District Court's acceptance of respondents' explanations of actions that petitioners contended evidenced an unlawful conspiracy, holding that petitioners' evidence did not "*prove* that 'the inference of conspiracy is reasonable in light of the competing inference[] of independent action.'" (A-9) (quoting *Matsushita*, 475 U.S. at 588). On September 29, 1997, the Court of Appeals denied petitioners' timely filed petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

The summary judgment standard applied below to resolve this antitrust action against petitioners conflicts with the summary judgment standard articulated by this Court and is in direct conflict with the standard applied by the Third, Seventh, Ninth and Tenth Circuits. Therefore, this writ should be granted to resolve this conflict.

The question of the proper standard to be applied in resolving summary judgment motions in complex antitrust actions has proven to be illusive. While everyone accepts certain standard principles -- *e.g.*, the facts and the inferences to be drawn from those facts must be viewed in the light most

favorable to the nonmoving party -- the courts often have had trouble applying them.

In 1962, this Court cautioned that:

> . . . summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Poller v. Columbia Broadcasting Sys., 368 U.S. 470, 473 (1962). While that caution tempered lower court decisions for some twenty-plus years, it provided little substantive guidance. In 1986, this Court addressed more substantive issues in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 586 (1986). Since then, courts and commentators alike have differed both as to *Poller*'s continuing viability and as to the lessons to be learned from *Matsushita*.

Indeed, since *Matsushita*, the application of standard principles has become more diverse rather than more uniform. The courts of appeals are now divided both as to when and how to apply the principles set forth. The decisions below exacerbate this split, going further than any previous court in imposing on the nonmoving party an inappropriate, if not insurmountable, burden.

A. The Decisions Below Requiring Antitrust Plaintiffs To Prove, At The Summary Judgment Level, The Existence Of A Conspiracy Misconstrue This Court's Decision In *Matsushita*, Ignore This Court's Decision in *Kodak*, And Exacerbate A Split In The Circuits.

At oral argument, the District Court advised petitioners that their evidence "must exclude the possibility of independent business judgment," and that "[the jury] must be

capable of no other conclusion than the inference that [respondents had] . . . no other . . . logical reasons for conducting the business as [they] did." Hearing Volume No. 1 at 90, *The Corner Pocket, et al. v. Video Lottery Technologies, Inc. et al.* Civ. No. 94-1019 (D.S.D. Oct. 29, 1996). The Eighth Circuit agreed:

> [A]bsent additional evidence of concerted action, the market conditions emphasized by plaintiffs do not *prove* that "the inference of conspiracy is reasonable in light of the competing inference[] of independent action."

(A-9) (emphasis added) (quoting *Matsushita*, 475 U.S. at 588). In so holding, the courts below misconstrued this Court's reasoning in *Matsushita*, as clarified in *Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 466 (1992), and exacerbated the conflict in the circuits. The Third and Ninth Circuits have held that the burdens imposed by *Matsushita* are limited in cases involving an economically rational conspiracy, and the Seventh and Tenth Circuits seemingly agree. *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993); *In re Petroleum Prod. Antitrust Litig.*, 906 F.2d 432, 438-40 (9th Cir. 1990). *See also In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1977); *Instructional Sys. Dev. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639, 646 (10th Cir. 1987). The Eighth Circuit, however, perceives itself to be "among the majority of courts and commentators who read *Matsushita* more broadly." (A-3) (citations omitted).

Two interrelated aspects of this Court's decision in *Matsushita* have led the circuit courts to disagree about its application in cases where the defendants have a rational economic motive to conspire. The first aspect results from the

Court's discussion of the burden on antitrust plaintiffs where the conspirators have a rational economic motive to conspire. After summarizing certain well-accepted principles of both antitrust and procedural law, this Court stated:

> It follows from those settled principles that if the factual context renders [plaintiffs'] claim implausible -- if the claim is one that simply makes no economic sense -- [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Matsushita, 475 U.S. at 587 (emphasis added). Since *Matsushita* did involve an alleged conspiracy that was economically irrational and practically infeasible, this analysis was certainly understandable, and in context, quite appropriate.

The second aspect of *Matsushita* that has caused the circuits to disagree lies in this Court's discussion of the role of inferences. Speaking in more general terms, this Court stated:

> But antitrust laws limit the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is

> reasonable in light of the competing inferences of independent action . . . .

Matsushita, 475 U.S. at 588 (citations omitted). The Court also clarified its reliance on *Monsanto*:

> In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct.

Matsushita, 475 U.S. at 593 (citing *Monsanto*, 465 U.S. at 762-64).

Later, the Court confirmed that its statement that "the antitrust laws limit the range of permissible inferences from ambiguous evidence in a § 1 case" can appropriately be limited to cases involving alleged conspiracies that are irrational:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial exists" within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Matsushita, 475 U.S. at 596-97 (citation omitted) (emphasis added).

In *Kodak*, this Court further emphasized that the rules espoused in *Matsushita* were dependent upon the unique factual situation therein:

> Because the defendants had every incentive not to engage in the alleged conduct . . ., the Court found an "absence of any rational motive to conspire." In that context, the Court determined that the plaintiffs' theory . . . made no practical sense, was "speculative, and was not "reasonable." Accordingly, the Court held that a reasonable jury could not return a verdict for plaintiffs and that summary judgment would be appropriate against them unless they came forward with more persuasive evidence to support their theory.
>
> The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. . . . *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision.[14]

Kodak, 504 U.S. at 468 (citations omitted) (emphasis added). In footnote 14, the *Kodak* Court cited with approval *Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639, 646 (10th Cir. 1987). *Kodak*, 504 U.S. at 468 n.14 ("summary judgment not appropriate under *Matsushita* when defendants 'could reasonably have been economically motivated'").

Moreover, even if this Court concludes that *Matsushita* should govern summary judgment standards in cases involving economically rational as well as economically irrational motives to conspire, the courts below imposed on petitioners a burden far more severe. Even the plaintiff in the irrational-motive case need only introduce evidence that "tends to exclude" the possibility of independent action. If plaintiffs

such as petitioners herein must "prove" that the conspirators did not act independently, the courts will have effectively imposed on plaintiffs defending against a summary judgment motion the same burden they might face if attempting to prosecute their own affirmative motion. Not even Professor Areeda, a critic of the Third and Ninth Circuits' approach to *Matsushita*, could accept such reasoning:

> Requiring plaintiffs to exclude the possibility of a defendant's innocence would increase the burden of proof beyond the usual civil standard of "a preponderance of the evidence" to "beyond a reasonable doubt" or even to "certainty." *Monsanto* meant no such revolution, for evidence that "tends to exclude" independent unilateral conduct may allow a jury to tilt the balance of inferences in favor of the alleged conspiracy.

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In stark contrast to the reasoning of the Eighth Circuit in this case, the Ninth Circuit has rejected the proposition that summary judgment is appropriate where inferences of conspiracy and inferences of innocent conduct are equally plausible:

> Allowing the district court to make that decision would lead to a dramatic judicial encroachment on the province of the jury. To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more "consistent" with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference.

> This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.

Petroleum Prods., 906 F.2d at 438 (emphasis added) (italics in original). Elsewhere in its opinion, the Ninth Circuit reiterated that *Matsushita* should not be read as "authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct." *Id.* at 439. The court reasoned:

> Such an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case. After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences. . . . Thus, such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. This cannot be what the Court meant in *Matsushita*. Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws.

Id. (emphasis added). Similarly, the Third Circuit has concluded that where defendants' challenged conduct is not procompetitive:

> more liberal inferences from the evidence should be permitted than in *Matsushita* because the attendant dangers from drawing inferences recognized in *Matsushita* are not present.

Petruzzi's IGA, 998 F.2d at 1232.

This Court's review of the decision below is necessary to resolve the conflict between the circuits regarding the import of this Court's decision in *Matsushita*. As the Third and Ninth Circuits have concluded, where the policy reasons that led to the result in *Matsushita* are absent, the need for heightened proof by a plaintiff is also absent. The decision below not only conflicts with this reasoning, but goes further. Indeed, the decision of the Eighth Circuit threatens to read out of Fed. R. Civ. P. 56 the requirement that a party resisting a motion for summary judgment need only establish contested issues of fact. This Court should grant *certiorari* to resolve the conflict and reestablish the proper burdens contemplated by the Federal Rules of Civil Procedure.

B. By Ignoring Evidence That Respondent VLT's Purported Sales Policy Was A Sham, Developed In Concert With Other Defendants, And By Granting Summary Judgment Based Solely Upon The Uncorroborated, Self-Serving Testimony Of VLT's Ex-President To The Contrary, The Decision Of The Courts Below Conflicts With Decisions Of This Court And Places All Antitrust Prosecutions At Risk.

In their Amended Complaint, petitioners alleged that Respondent VLT participated in the operator respondents' conspiracy to allocate territories and fix prices by agreeing with the operators to refuse to deal with other operators who were not members of the MVA or who were not approved by an MVA member. In support of its motion for summary judgment, VLT primarily relied on the self-serving deposition testimony of its founder, Larry Lippon. Mr. Lippon testified that while previously doing business in Montana, he developed a sales policy of selling only to select purchasers based upon various beliefs that he had about industry practices in general. He further testified that he continued this policy when he

commenced business in South Dakota. Respondents introduced no evidence corroborating any of Mr. Lippon's testimony.[6]

On the other hand, petitioners introduced substantial evidence that, regardless of what VLT's policies might have been in Montana, the policy as purportedly applied in South Dakota was a sham, developed and implemented in concert with other respondents. The district court granted summary judgment for VLT, finding that:

> Video Lottery Technologies' statement through Larry Lippon pertaining to the desire to present the Video Lottery Technologies product in the most alluring fashion establishes a legitimate factual reason for its policy of selling only to selected operators.

(B-22 - B23) (emphasis added). In affirming the district court decision, the Court below agreed, finding that "Video Lottery Technologies has given legitimate business reasons for its sales practices, which we may not lightly disregard." (A-8) (citation omitted). In fact, the Court below gave VLT "the presumption of unilateral decision making." *Id.* n.3.

VLT offered no claim and certainly no evidence that it lacked a rational economic motive to join in the conspiracy. As a consequence, the Eighth Circuit's opinion is inconsistent, if not in direct conflict, with this Court's opinions in *Monsanto*, *Matsushita*, and *Kodak*. Moreover, the implications of the Eighth Circuit opinion, if left unredressed, are staggering. If an antitrust defendant can obtain summary judgment based on nothing more than its self-serving testimony that it had legitimate reasons for its conduct, all

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[6] Indeed, VLT officers and employees testified without exception that it was solely Mr. Lippon's policy and he advised them to "let me worry about the risk."

antitrust prosecutions will be at risk. Virtually every defendant that elects to contest an antitrust action will most certainly be able to supply some legitimate explanation for its conduct. When such explanations are elevated to dispositive status in the face of significant evidence to the contrary, the courts will have imposed on antitrust plaintiffs a burden neither required nor even permitted by the Federal Rules of Civil Procedure.

Review by this Court is essential to resolve the inconsistencies between the ruling herein and those in *Monsanto, Matsushita*, and *Kodak*, and to clarify the nature of the evidence a plaintiff must adduce when an alleged antitrust conspirator, as is so often the case, simply claims its motives were legitimate.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: December 24, 1997. Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-4208

The Corner Pocket of Sioux Falls, Inc., et al.,	*	
Plaintiffs - Appellants,	*	Appeal from the United States District Court for the District of South Dakota.
v.	*	
Video Lottery Technologies, Inc., et al.,	*	
Defendants - Appellees.	*	

Submitted: June 9, 1997
Filed: August 29, 1997

Before LOKEN and ROSS, Circuit Judges, and FENNER,* District Judge.

LOKEN, Circuit Judge.

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* The HONORABLE GARY A. FENNER, United States District Judge for the Western District of Missouri, sitting by designation.

In 1989, the State of South Dakota initiated a video lottery regulated by the South Dakota Lottery Commission. See S.D. CODIFIED LAWS Ch. 42-7A. In this type of lottery, games of chance are played on coin-operated, computer-controlled video machines. The video lottery machines are privately owned, but the State owns the operating software and controls the games through a central computer system. The machines repay players 80-95% of the amounts wagered. The State takes a portion of the remaining gross revenues (initially 22%, now 50%) by electronically sweeping the machine owner's bank account. See generally Chance Mgmt., Inc. v. State of South Dakota, 97 F.3d 1107, 1108 (8th Cir. 1996), cert. denied, 117 S. Ct. 1083 (1997); Poppen v. Walker, 520 N.W.2d 238, 249 (S.D. 1994).

In November 1993, the Lottery Commission investigated the video lottery machine market and concluded there was effective competition. Plaintiffs nonetheless commenced this antitrust class action in June 1994, alleging that Video Lottery Technologies, Inc. ("VLT"), manufacturer of the most popular video lottery machines, had refused to sell its machines to new customers for the purpose of enforcing a conspiracy among vending machine distributors to allocate territories and fix prices, all in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Following discovery, the district court[1] granted summary judgment for defendants on the ground that plaintiffs had failed to present sufficient evidence of an unlawful conspiracy. Plaintiffs appeal, launching a three-pronged attack on the district court's decision. We affirm.

A. Plaintiffs first argue that the district court erred in applying the legal standard for granting summary judgment in antitrust cases. Plaintiffs criticize the court's "heavy reliance" on Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475

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[1] The HONORABLE RICHARD H. BATTEY, Chief Judge of the United States District Court for the District of South Dakota.

U.S. 574, 588 (1986), where the Supreme Court stated that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Relying primarily on cases from the Third and Ninth Circuits, plaintiffs argue that this portion of Matsushita does not apply to this case because the conspiracy they allege served defendants' economic interests. However, we are among the majority of courts and commentators who read Matsushita more broadly. See Lovett v. General Motors Corp., 998 F.2d 575, 578-79 (8th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); City of Mt. Pleasant, Iowa v. Associated Elec. Co-op, Inc., 838 F.2d 268, 273 (8th Cir. 1988); II AREEDA AND HOVENKAMP, ANTITRUST LAW ¶ 322 at 70-72, 75-81 (rev. ed. 1995). In its Memorandum Opinion and Order, the district court discussed at length the appropriate summary judgment standard in complex antitrust cases, carefully reviewing these relevant cases. We conclude that the court properly articulated and applied the governing summary judgment standard of this Circuit.

B. Plaintiffs next argue that the district court engaged in improper summary judgment fact-finding when it accepted defendants' explanations for market conditions that, in plaintiffs' view, evidence an unlawful conspiracy. To put this issue in context, we must briefly describe the South Dakota video lottery machine market.

The private sector participants in the South Dakota video lottery are defined by statute. The State separately licenses video lottery machine manufacturers and distributors, who manufacture and sell the machines; "operators," who own the machines and account to the State for their revenues; and gambling "establishments," where the machines are played by consumers of this government-sponsored gambling. See S.D. CODIFIED LAWS §§ 42-7A-1(15-17), 41-45. Licensed manufacturers and distributors must sell their machines to

licensed operators, who typically lease the machines to licensed establishments. Only bars, restaurants, and inns that sell alcoholic beverages may become licensed establishments. Operators and establishments negotiate their respective shares of the machine revenues remaining after the State takes its cut. Typically, those shares are stated as a percentage "split," such as 50-50.

The South Dakota video lottery commenced in October 1989. By the end of 1989, six manufacturers were licensed to sell video lottery machines approved by the State. Not surprisingly, those best prepared to distribute these machines were the established distributors of coin-operated vending machines, businesses that for years had placed juke boxes, pool tables, pinball machines, and dart boards in bars and restaurants around the State. These distributors and their trade association, the Music and Vending Association ("MVA"), had successfully lobbied the Legislature to authorize a video lottery. When the lottery began, MVA members had obtained operator licenses and were ready to supply video lottery machines to licensed establishments located on the operators' well-established vending machine routes.

As the lottery got underway, something unanticipated occurred -- South Dakota gamblers overwhelmingly preferred to play video lottery machines manufactured by VLT. But these popular machines proved hard to get. Beginning as early as the fall of 1989, newly-established operators, including licensed establishments that obtained operator licenses so they could buy their own machines, had difficulty buying machines from VLT. To outsiders, it appeared that VLT was refusing to deal with anyone other than well-established vending machine distributors and those "squeaky wheels" who threatened litigation or complained to the Lottery Commission. Though VLT denied such an exclusionary policy and the Lottery Commission's investigation concluded that the

marketplace was sufficiently competitive, the named plaintiffs -- two licensed operators and three licensed establishments -- smelled an unlawful conspiracy and began this action against VLT, certain licensed operators who are long-standing vending machine distributors, and the MVA.

Plaintiffs' Allegations. Although the lawsuit was initially prompted by VLT's refusal to sell video lottery machines to plaintiffs and others from the fall of 1989 to late 1993, plaintiffs' antitrust claims evolved through discovery and the summary judgment process to include the following allegations:

-- MVA and the operator defendants conspired to allocate operator territories in South Dakota. MVA members have their own distribution routes and went to great lengths to avoid competing in each other's territories. For example, MVA member protocol is to refer a competitor's complaining customer to that competitor, rather than try to obtain the account.

-- MVA and the operator defendants conspired to fix prices by agreeing to make video lottery machines available to establishments for a 50-50 split of the net revenues. In 1989, one MVA member circulated a sample lease agreement showing a 60-40 split. The operator defendants then agreed to adopt the 50-50 split, which was reflected in over 80% of their contracts with establishments between 1989 and 1993. When the conspiracy broke down,[2] the operators' share of negotiated splits decreased.

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[2] Paradoxically, plaintiffs allege that the conspiracy broke down as a result of the Lottery Commission's investigation but argue that the Commission's report -- which found the video lottery machine marketplace competitive -- should be ignored as irrelevant. In our view, the heavily regulated nature of this business is highly relevant in determining whether "the inference of conspiracy is reasonable in light of the competing inferences of independent action." Matsushita, 475 U.S. at 588.

-- VLT knowingly enforced the operator conspiracy by refusing to sell its video lottery machines directly to establishments, or to licensed operators other than the operator conspirators. VLT's policy of not selling machines to operators who leased to establishments at 90-10 or 80-20 splits helped enforce the cartel's conspiracy to impose 50-50 splits on establishments. VLT assumed the role of cartel enforcer out of gratitude for help MVA members gave VLT in quickly obtaining a South Dakota manufacturer license, and out of fear that MVA would otherwise use its influence to tarnish VLT's reputation in other States.

Defendants' Response. In moving for summary judgment, defendants painted a very different picture of the video lottery machine market than plaintiffs' conspiracy-dominated portrait:

-- When the video lottery began, long-time vending machine distributors had well-defined territories or routes, typically encompassing the area in which customer machines can be serviced in one day's drive. These operators concentrated on placing the new video lottery machines with existing bar, restaurant, and hotel customers in their traditional territories. When supplies of the popular VLT machines became limited, operators served their existing customers first. There was no agreement to allocate territories or customers. Many MVA members have overlapping routes, and plaintiffs have no evidence describing defendants' behavior along route overlaps, where one might reasonably expect to find competition absent a conspiracy.

-- The 50-50 revenue split was common in the coin-operated vending machine industry long before the video lottery. When the lottery was new and its prospects uncertain, licensed operators and establishments reasonably adopted this equitable-looking split; indeed, the named plaintiffs and other non-MVA operators did so. When the initial leases expired, operators and establishments renegotiated based upon actual experience with VLT machines. Establishments with

profitable machines demanded and received more generous splits. Thus, the increase in split variety (pricing diversity), which plaintiffs attribute to the conspiracy breaking down, is entirely consistent with what would have happened in a competitive marketplace.

-- VLT was not the enforcer for an operator cartel. Throughout the alleged conspiracy, VLT sold machines to non-MVA members, to new entrants in the operator market, and occasionally to establishments that obtained operator licenses and could lawfully buy machines. VLT's refusals to deal are explained by factors other than the alleged conspiracy. First, VLT's sales policy, which predated its entry into the South Dakota market, was to sell machines to vending machine distributors, not retail establishments. VLT markets to distributors because it believes that well-serviced machines will be more popular and generate more revenues, because in VLT's experience bars and restaurants do not properly service machines, and because VLT does not wish to perform the service function. VLT prefers well-established distributors experienced in servicing machines. This policy explains many of VLT's refusals to deal during the alleged conspiracy period, including its refusal to sell to operators who leased machines at 90-10 or 80-20 splits, terms that VLT considered tantamount to resale. A manufacturer may refuse to deal for these reasons, so long as it does so independently. See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984); Weather Wise Co. v. Aeroquip Corp., 468 F.2d 716, 718 (5th Cir. 1972), cert. denied, 410 U.S. 990 (1973). Second, the immediate success of VLT's machines in South Dakota meant that VLT received many more orders than it could fill. In the 1989-1992 period, virtually all buyers encountered back order delays. When forced to prioritize, VLT understandably favored its best customers -- well-established vending machine distributors -- and other prospective buyers who threatened litigation or complained to

the Lottery Commission. Thus, as the Lottery Commission concluded, factors other than the alleged conspiracy explain why plaintiffs encountered difficulty in obtaining VLT machines.

In granting summary judgment to defendants, the district court concluded that VLT had rationally explained its policy of selling only to selected operators, that the prevalence of 50-50 splits was non-actionable conscious parallelism by the defendant operators, and that the operators' practice of staying within their well-established service routes did not evidence an agreement to allocate territories. Plaintiffs contend the court usurped the jury's function by inferring lawful conduct from defendants' descriptions of the marketplace. We disagree. Because "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," the court must necessarily weigh the summary judgment evidence of both parties in determining whether plaintiffs' evidence "tends to exclude the possibility that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588.

After carefully reviewing the record, we agree with the district court that the objectively observable market conditions are consistent with defendants' assertions (i) that VLT acted unilaterally in choosing customers for its video lottery machines in South Dakota, and (ii) that the operator defendants acted independently in buying and leasing VLT's machines. Regarding the former, VLT has given legitimate business reasons for its sales practices, which we may not lightly disregard. See Lovett, 998 F.2d 580-81; Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986).[3] Regarding the operators' conduct,

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[3] Though VLT received at least one written complaint from an operator customer about another operator's "cost cutting," complaints by distributors are not sufficient to overcome the presumption of unilateral decision-making. See Lovett, 998 F.2d at 578; H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1544-45 (8th Cir. 1989).

giving priority to customers in an established territory is to be expected, particularly when VLT machines are in short supply, and the prevalence of 50-50 splits in the early years of the video lottery is parallel conduct that, standing alone, lacks probative value. See Pumps and Power Co. v. Southern States Indus., Inc., 787 F.2d 1252, 1258 (8th Cir. 1986).

At oral argument, plaintiffs pointed to a letter sent from defendant Hub Music to Ramkota, Inc., a chain of licensed establishments, as direct evidence of price-fixing. The letter appears to be a joint proposal on behalf of MVA operators to lease VLT machines on common terms (including a 50-50 split) to the various Ramkota hotels located "in their respective areas." There is nothing in the record putting this proposal in context, and plaintiffs apparently did not argue its significance to the district court.[4] Because the letter disclosed the author's affiliation with MVA, plaintiffs suggest it is proof of a general agreement among MVA members to fix standard lease terms. But it could also have been a specific proposal on behalf of multiple suppliers none of whom could satisfy the needs of a multi-location customer, which from an antitrust standpoint is a very different document indeed. Without more context, the letter is too ambiguous to help plaintiffs defeat summary judgment.

For the foregoing reasons, we conclude that, absent additional evidence of concerted action, the market conditions emphasized by plaintiffs do not prove that "the inference of conspiracy is reasonable in light of the competing inference[] of independent action." Matsushita, 475 U.S. at 588.

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[4] After oral argument, defendants moved to exclude the letter or to expand the record on appeal to include the author's deposition testimony regarding the letter. We deny that motion because the letter was part of the record before the district court, and the deposition passages encompassed by the motion to expand the record were not.

C. Finally, plaintiffs' argue that the district court erred in discounting affidavits and secretly taped conversations, testimonial evidence that plaintiffs contend provides sufficient additional evidence of the alleged conspiracy to withstand summary judgment. This evidence consisted of the following:

1. In response to defendants' motion for summary judgment, plaintiffs submitted an affidavit by Bill Welk, a former partner of defendant James Koehler in developing motels. Welk averred that Koehler was late for a May 1989 business flight and explained that he had been meeting with MVA members at the "Goose Camp," where they agreed to "limit the area within which they conducted the video lottery business" and not compete in each other's route areas. Defendants responded with affidavits and business records establishing that Welk and Koehler could not have had such a meeting and conversation before January 1990. Plaintiffs responded with a second Welk affidavit in which he admitted confusion regarding the dates, reaffirmed that the conversation with Koehler did occur, and promised a third affidavit supplying the proper dates. Plaintiffs never submitted a third affidavit.

The district court noted that the Welk affidavit could be rejected on procedural grounds because plaintiffs disclosed neither Welk as a witness nor the substance of his affidavit during discovery. Based on the summary judgment record, the court dismissed Welk's alleged conversation with Koehler as a "factual impossibility" that did not raise a genuine issue of material fact. We agree. Plaintiffs inexcusably concealed Welk during discovery and then sprung his affidavit testimony during the summary judgment briefing process.[5] Despite years

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[5] According to the Lottery Commission's November 1993 Report, witnesses at the Commission's hearing included "[o]ne licensed establishment owner, Bill Welk of Aberdeen." Thus, concealment of Welk's assertions was unconscionable. A reasonable inference is that

to perfect this sneak attack, presumably with the aid of Welk's business records, plaintiffs submitted an affidavit in which every verifiable detail was incorrect. When defendants pointed out the errors, including the critical error as to the date of the alleged conversation, Welk promised to clarify his recollection and then reneged on that promise. "Where a party emphatically and wittingly swears to a fact, it bears a heavy burden -- even in the summary judgment context -- when it seeks to jettison its sworn statement." Pyramid Sec. Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1123 (D.C. Cir. 1991), cert. denied, 502 U.S. 822 (1992); cf. Prosser v. Ross, 70 F.3d 1005, 1008 (8th Cir. 1995); Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 289 (8th Cir. 1988). The district court properly disregarded the Welk affidavits.

2. Plaintiffs submitted a secretly tape-recorded conversation in May 1993 between the principals of plaintiff G & T Gaming and James Trucano, brother of defendant Michael Trucano. The ostensible purpose of the meeting was to urge Trucano to use his personal connections to help G & T obtain VLT machines. Plaintiffs cite the resulting conversation as evidence the defendant operators did not compete for each other's accounts and VLT only sold to MVA members. Trucano left the coin-vending distributor business in South Dakota in 1988, prior to the start-up of the video lottery. At his deposition, he denied firsthand knowledge of the South Dakota video lottery machine market, and plaintiffs have no evidence he participated in the conspiracy. His comments in the taped conversation are ambiguous as to whether operators avoid "stealing" accounts because of an agreement not to do so, and lend no support to plaintiffs' theory that VLT enforced an operators' conspiracy. The

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plaintiffs knew Welk's accusations against his former partner and current litigation adversary, Koehler, would not withstand scrutiny.

district court properly discounted this tape as non-probative, inadmissible hearsay.

3. Plaintiffs submitted two secretly tape-recorded conversations in 1993 between Charles Huber, a G & T Gaming principal, and a competing operator, defendant James Koehler, owner of defendant Hub Music. Ostensibly, Huber was seeking either an "allotment" of VLT machines or to sell G & T Gaming to Koehler. In the course of their lengthy conversations, Huber repeatedly made statements or asked questions in a way that invited the unsuspecting Koehler to acknowledge an operators' conspiracy. Each time, Koehler either flatly denied that an anticompetitive agreement existed, responded ambiguously, or changed the subject.[6] Nothing Koehler said is inconsistent with unilateral behavior. The district court properly discounted these tapes as too ambiguious for a reasonable jury to infer that a conspiracy existed. Accord Richards v. Neilson Freight Lines, 810 F.2d 898, 903-04 (9th Cir. 1987).

4. Plaintiffs submitted three secretly tape-recorded telephone conversations in April, May, and August 1993

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[6] For example, Huber's question, what happens if an MVA member "doesn't play by the rules," produced the following dialog:

Koehler: [It means y]ou're no longer friends.

Huber: I mean fine you're no longer friends but I mean there's gotta be more hold than that.

Koehler: No.

Huber: They don't get a supply of product or they get sanctioned or I assume you don't have anything in writing between all of the members.

Koehler: We don't no, we're trying ... as an association we're trying to make everybody more profitable -- we can do a better job, service our locations better, have money to reinvest[. Y]ou know you make it sound like we're doing price fixing ....

between G & T Gaming and Dana Waggener, who had just resigned as VLT's sales manager to work for a competing manufacturer.[7] Waggener said that he left VLT because he did not like its policy of not selling to all licensed operators and that VLT "protected the hell out of" the operators it preferred, who "kinda had their roots in the industry." Waggener's ambiguous statements are consistent with VLT's explanation of its sales policy and therefore do not support an inference that VLT acted as the enforcer of an operator-level conspiracy. Moreover, the statements were made while Waggener was working for a VLT competitor and were not in furtherance of the alleged conspiracy. Thus, the district court properly discounted these tapes as non-probative, inadmissible hearsay. See Fed. R. Evid. 801(d)(2)(E); United States v. Snider, 720 F.2d 985, 992 (8th Cir. 1983), cert. denied, 465 U.S. 1107 (1984).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[7] Waggener later returned to VLT, so his deposition testimony did not support plaintiffs' conspiracy claim. Like the district court, we do not consider whether plaintiffs may avoid summary judgment by relying on secretly taped conversations that the unsuspecting declarant later disavows under oath.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

THE CORNER POCKET OF SIOUX FALLS, INC., a South Dakota corporation, d/b/a THE POCKET; ROBERT REMACLE, d/b/a RALPH'S BAR, COUNTY SEAT and R&R VENDING; G & T GAMING, INC., a South Dakota corporation; R.E.L. TRUST, a South Dakota business trust, R.E.L. TRUSTEE CORP., Trustee; and J. CLIFFORD FOLEY, d/b/a FOLEY'S BAR,	)	CIV. 94-1019
Plaintiffs,	)	
vs.	)	MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS
VIDEO LOTTERY TECHNOLOGIES, INC., a Delaware corporation; MUSIC & VENDING ASSOCIATION, a South Dakota corporation; JAMES KOEHLER and TIM HOFER, d/b/a HUB MUSIC AND VENDING; LEO FREIDEL; JERRY FREIDEL; KERRY FREIDEL; FREIDEL'S MUSIC AND	)	

RECREATION, INC., a South Dakota corporation; ELROY G. GRUENEWALD; DAVID A. BACKLUND; D & E MUSIC & VENDING, INC., a South Dakota corporation; ROBERT J. CORREA; HASVOLD VENDING COMPANY, a South Dakota corporation; DEAN SCHROEDER; MUSIVEND ENTERPRISES, INC., a South Dakota corporation; W.C. "BUZZ" OLIGMILLER RUSHMORE AMUSEMENT, INC., a South Dakota corporation; MANFORD MUSIC & VENDING, INC., a South Dakota corporation; MICHAEL J. TRUCANO; and AUTOMATIC VENDORS, INC., a South Dakota corporation,

Defendants.

NATURE AND PROCEDURAL HISTORY

[¶1] Plaintiffs are video lottery machine licensed establishments and/or licensed operators in South Dakota who bring this class action individually and on behalf of other licensed video lottery machine operators and establishments. They seek damages and injunctive relief against the

defendants, alleging a violation of the Sherman Act (15 U.S.C. § 1) and the Clayton Act (15 U.S.C. §§ 15 and 26).

[¶2] Specifically, plaintiffs allege that beginning sometime prior to October 1, 1989, defendants as co-conspirators engaged in a combination and conspiracy to unreasonably restrain trade. The conspiratorial conduct is alleged as follows: (1) agreement to fix the lease prices of space for the placement of machines; (2) agreement to refuse to deal with persons other than their own trade association; and (3) agreement to divide and allocate territories within the state of South Dakota for the placement of such machines. See Plaintiffs' First Amended Complaint, Docket #136, ¶¶ 30, 31. Plaintiffs further contend that the underlying effect of the alleged combination and conspiracy was to: (1) suppress, restrain, and eliminate competition; (2) maintain at an artificially low and noncompetitive level the prices paid for lease of space to association members; (3) deny plaintiffs access to video lottery machines, thereby restricting their ability to compete in the video lottery business; and (4) enjoin competition for the leasing of space for the machines. Id. at ¶33. Plaintiffs further allege fraudulent concealment of the conspiracy. Id. at ¶35.

[¶3] On July 15, 1996, defendants filed their Fed. R. Civ. P. 56 motion for summary judgment. Oral arguments were held on October 29, 1996. The Court has jurisdiction under 28 U.S.C. § 1331. The Court grants summary judgment to defendants as against all of plaintiffs' antitrust claims.

STATEMENT OF FACTS

[¶4] A. Video Lottery's Historical Background

[¶5] The recent Eighth Circuit decision of Chance Management, Inc. v. South Dakota, __ F.3d __, 1996 WL 580287 *1-2 (8th Cir. Oct. 10, 1996), sets forth the historical

background of video lottery in South Dakota. Additional facts material to the resolution of defendants' summary judgment motion are set forth below.

[¶6] In 1986 the South Dakota Constitution was amended to authorize a state lottery or video games of chance. See S.D. Const. art. III, § 25. On March 1, 1989, South Dakota enacted a statutory scheme authorizing video lottery games which became effective July 1, 1989. See 1989 S.D. Sess. L. Ch. 368 (codified as amended at S.D.C.L. ch. 42-7A, including S.D.C.L. §§ 42-7A-1, -3,- 4, -8, -13 through -16, -36 through -50). Video lottery consists of games of chance played on a controlled video machine simulating the games of poker, blackjack, keno, and bingo. Chance Management, 1996 WL 580287, at *1.

[¶7] South Dakota's video lottery industry is highly regulated pursuant to a comprehensive statutory and regulatory scheme. See S.D.C.L. ch. 42-7A; A.R.S.D. ch. 48:02. The South Dakota Lottery is an independent state agency functioning under the direction of the South Dakota Lottery Commission which is empowered to administer the state lottery in order to provide overall management of the state lottery and control over the operation of the games. See S.D.C.L. § 42-7A-2. Although the state does not actually own the video machines, it does own the dominant software programs that operate the machines and it receives a percentage of the net machine revenue. Chance Management, Inc., 1996 WL 580287, at *1.[1] Thus, South Dakota is a market participant in the state gaming market. Id. at *8.

[¶8] The video lottery statutes and administrative rules recognize the following four classifications of video lottery licensees:

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[1] At the start-up of video lottery, the state received a 22 percent share of the net machine revenue, which has since increased to 50 percent. See S.D.C.L. § 42-7A-63.

(1) Manufacturers - entities responsible for the assembly or production of video lottery machines and associated equipment for sale or use in South Dakota (See S.D.C.L. § 42-7A-1(16); A.R.S.D. 48:02:01:01(1));
(2) Distributors - entities responsible for the distribution or sale of video lottery machines or associated equipment in South Dakota (See S.D.C.L. § 42-7A-1(15); A.R.S.D. 48:02:01:01(7));
(3) Operators - entities responsible for the purchase, service, maintenance, or placement of video lottery machines or associated equipment for public use in South Dakota (See S.D.C.L. § 42-7A-1(17); A.R.S.D. 48:02:01:01(11)); and
(4) Establishments - entities licensed to sell alcoholic beverages for consumption upon the premises where video lottery machines are located (See S.D.C.L. § 42-7A-1(6); S.D.C.L. § 42-7A-37.1; A.R.S.D. 48:02:01:01(9)).[2]

[¶9] Only licensed manufacturers and distributors are authorized to sell video lottery machines. See S.D.C.L. § 42-7A-1(15)-(16). Licensed establishments may not purchase or own video lottery machines unless they have obtained an operator license. See S.D.C.L. § 42-7A-42. No more than ten video lottery machines may be placed in any licensed establishment. See S.D.C.L. § 42-7A-44; A.R.S.D. 48:02:11.

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[2] The Court is cognizant of the fact that defendants contend that there is also an operator/establishment or hybrid licensee--licensed establishment owners purchasing and placing video lottery machines in that establishment only. See Defendants' Statement of Material Facts at ¶ 6 [hereinafter "DSMF at ¶ __"] (citing S.D.C.L. § 42-7A-42). However, for purposes of this opinion, the Court will limit its discussion to the four classifications listed in the video lottery statutes and administrative rules.

Under the South Dakota video lottery scheme, manufacturers sell video lottery machines to licensed operators which in turn either lease the machines to licensed establishments or place the machines in their own licensed establishments, for a percentage of the profits of which the state receives a share.

[¶10] Between March 1, 1989, the date of legislative enactment, and October 16, 1989, the date of video lottery start-up, numerous establishments and operators made arrangements regarding placement of video lottery machines on the establishment premises.[3] There were two manufacturers approved and licensed by the South Dakota Lottery Commission prior to the date of video lottery start-up --Video Lottery Consultants (Video Lottery Technologies) [hereinafter "VLT"][4] (approved and licensed on September 24, 1989); SMS Manufacturing (approved and licensed on October 3, 1989).[5] Three months after start-up, there were six manufacturers with approved machines.[6]

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[3] See DSMF at ¶ 11 (citing Deposition of Mike Trucano at 35:25 to 36:14 (Feb. 21, 1996); DSMF, Tab 7 (Affidavits of Operators David Backlund, Elroy Gruenewald, Jerry Freidel, Tim Hofer, Mike Trucano, and Lloyd Freidel).

[4] Video Lottery Technologies, Inc. (VLT) is a holding company, and one of its subsidiaries is Video Lottery Consultants, Inc. The particular video lottery machine made by VLT is referred to as a "VLC" machine.

[5] See DSMF, Tab 1 at 5 (history and background section from defendants' joint memorandum in opposition to class certification (July 14, 1995)).

[6] See DSMF at ¶ 13 (citing DSMF, Tab 2 (report to the Interim Video Lottery Committee on the ability of licensed operators/establishments to purchase video lottery machines and equipment in South Dakota (signed Nov. 2, 1993)). As of the commencement of this action, the following manufacturers had obtained manufacture licenses: VLC, SMS, Merit, Bally, TDC, Aristocrat, U.S. Games, IGT, Foxtronic, and PGI.

[¶11] On November 14, 1989, the Lottery Commission adopted a policy prohibiting manufacturers and distributors from employing a business practice of refusing machine sales to operators within a certain class based on the type and size of their operation.[7] However, the policy did not mandate that manufacturers and distributors sell machines to every operator who expressed interest, as long as a refusal was based on "sound business practices" such as failure to demonstrate adequate financing to purchase the quantity of machines requested, late payments on machines previously ordered, or repeated problems in the service and repair of machines by an operator.[8] The Lottery Commission repealed the policy 14 months later.[9]

[¶12] Pursuant to a directive of the South Dakota legislature, a special legislative committee held a public hearing on September 16, 1993, regarding the ability of licensed operators to purchase video lottery machines and equipment.[10] Based on the testimony provided at the hearing, the Lottery Commission determined that there were several manufacturers of video lottery machines actively participating in the

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[7] See DSMF at ¶ 14 (citing *In re Official Policy of the South Dakota Lottery, Sale of Video Lottery Machines*, Nov. 14, 1989 (Docket # 163, Attachment 5); DSMF, Tab 1 at 7-8; DSMF, Tab 2)).

[8] Id.

[9] Id.

[10] See DSMF at ¶ 15 (citing 1993 Sess. L. Ch. 318 § 5; DSMF, Tab 1 at 5-9; DSMF, Tab 2); DSMF at ¶ 16 (citing DSMF, Tab 1 at 6-7; DSMF, Tab 2 at 4-7). All of the named plaintiffs or their representatives were present at the hearing, and those who gave testimony at the public hearing included Robert Remacle (d/b/a Ralph's Bar, County Seat and R & R Vending); Terry Narum (The Corner Pocket of Sioux Falls, Inc.); Robert Thimjon (representing R.E.L. Trust/Ramkota Inns); and J. Clifford Foley. See DSMF at ¶ 17 (citing DSMF, Tab 1 at 7 n.5). David Wisdom and Charles Huber of plaintiff G & T Gaming, Inc., were also present at the hearing, but did not provide testimony. Id.

marketplace and that there was effective competition in the video lottery marketplace.[11]

[¶13] B. Parties

[¶14] Plaintiffs can be categorized into the following two groups: (1) G & T Gaming, Inc., a South Dakota corporation, and R & R Vending are licensed operators, commonly referred as "true operators" in that they place video lottery machines in establishments owned by others; (2) The Corner Pocket of Sioux Falls, Inc., R.E.L. Trust (a trust to administer video lottery within Ramkota Companies), and Foley's Bar are licensed operators purchasing and placing machines in their respective licensed establishments.

[¶15] Defendants can be categorized into the following four groups: (1) Video Lottery Technologies, Inc. (VLT) is a manufacturer of video lottery machines which it sells to operators; (2) Music and Vending Association of South Dakota (MVA) is the trade association of the coin operators; (3) eight operator companies which are MVA members--Hub Music and Vending, Freidel's Music and Recreation, Inc., Musivend Enterprises, Inc., Rushmore Amusement, Inc., Automatic Vendors, Inc. and D & E Music & Vending, Inc., Hasvold Vending Company, Manford Music & Vending, Inc.; and (4) eleven individuals with interests in the eight operator companies--Jim Koehler, Tim Hofer, Leo Freidel, Jerry Freidel, Kerry Freidel, Roy Gruenewald, Dave Backlund, Bob Correa, Dean Schroeder, "Buzz" Oligmiller, and Michael Trucano.

[¶16] Video Lottery Consultants, Inc., founded by sole owner Larry Lippon, is now a subsidiary of Video Lottery Technologies, Inc. (VLT). From time to time, the acronym VLT and VLC are used interchangeably. VLT is a video

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[11] See DSMF at ¶¶ 18, 19 (citing DSMF, Tab 2 at 7-8).

lottery machine manufacturer and distributer as defined under South Dakota law. The particular video lottery machine manufactured by VLT is referred to as a "VLC" machine. At the start-up of video lottery, VLCs out-played the non-VLCs two to one, and today VLCs out play non-VLCs four to one.[12] It is undisputed that Larry Lippon developed a sales policy prior to video lottery start-up while manufacturing and selling video devices for the Montana market in which he would only sell his equipment to qualified coin operating companies that had experience and background in the amusement and vending business.[13] One of VLT's reasons for choosing qualified operators to place, service, and maintain its equipment included a desire to present the VLC product in the most desirable possible way to both the ultimate user as well as the purchaser of the equipment.

[¶17] Music and Vending Association (MVA) is a trade association whose members include the operator defendants. MVA has served as a trade association for the coin operator industry for decades, monitoring legislative issues and seeking to promote the interests of the industry.[14] During the years and months prior to enactment of the 1989 legislation authorizing video lottery, MVA members met and discussed proposed legislative schemes, including lobbying efforts.

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[12] See Plaintiffs' Statement of Material Facts at ¶ 9 [hereinafter "PSMF at ¶ __"] (citing PSMF, Tab 23 at 53:20-25, 54:1-8 (Deposition of Michael Trucano)).

[13] See DSMF at ¶35 (citing DSMF, Tab 19 at 64:16 to 69:21, 97:13 to 99:22; DSMF, Tab 11 (Deposition of Leo Freidel); DSMF, Tab 2 at 5-7).

[14] See DSMF at ¶ 73 (citing DSMF, Tab 24 at 19:1-15; DSMF, Tab 12 at 17:9-14; DSMF, Tab 8 at 41:1-16). The MVA was originally designated at the South Dakota Phonograph Operators' Association. The Association changed its name to MVA in 1962 via amendments to the articles of incorporation. See DSMF at ¶ 71 (citing DSMF, Tab 6 (Trucano Deposition Exhibit 191)).

[¶18] It is undisputed that the operator defendants had historically established service routes through prior lease arrangements with establishments for machines other than video lottery machines, based on economic and geographic concerns. South Dakota is a large state consisting of many small municipalities separated by expansive farming and ranch land. At video lottery start-up, the operator defendants ordered a variety of video lottery machines from various manufacturers and distributors, not restricting their video lottery machine orders to only VLC machines. The operator defendants were initially exposed to financial risks in purchasing the machines at a cost of approximately $5,000 per machine. With a statutory limit of ten machines to each establishment, this represented a sizable investment to the operators.

[¶19] C. Allegations

[¶20] Plaintiffs allege that all of the defendants engaged in a combination and conspiracy to restrict or eliminate competition in the sale of VLCs or the lease of space for the placement of VLCs, in violation of Section 1 of the Sherman Act.[15] They allege that defendants formulated and effectuated the combination and conspiracy by agreeing to: (1) divide and allocate territories within South Dakota for the placement of VLCs; (2) refuse to deal with anyone other than MVA members or "MVA approved operators" in the sale of VLCs; and (3) fix the price of leasing VLCs and other video lottery machines.[16] Plaintiffs further contend that the conspiracy had the following effects: (1) price competition in the lease of space for placement of VLCs has been suppressed, restrained,

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[15] See First Amended Complaint at ¶¶ 29, 30.

[16] Id. at ¶ 31.

and eliminated; (2) prices paid by MVA members for the lease of space for the placement of VLCs were maintained at artificially low and noncompetitive levels; (3) plaintiffs were denied access to VLCs, thereby restricting their ability to compete in the video lottery business; and (4) competition in the leasing of space for the placement of VLCs has been injured.[17] In their prayer for relief, plaintiffs request this Court to: (1) determine the conspiracy to be a violation of Section 1 of the Sherman Act; (2) enter judgment in favor of plaintiffs and members of the class for treble damages sustained by plaintiffs and class members; and (3) enjoin defendants from continuing, maintaining, or renewing the conspiracy.[18] According to plaintiffs, the conspiracy broke down in late 1993, after the legislative inquiry that led to the September 16, 1993, hearing regarding the ability of licensed operators to purchase video lottery machines and equipment in South Dakota.[19]

[¶21] 1. Territorial Allocation

[¶22] Plaintiffs allege that MVA members engaged in a conspiracy to allocate territories in South Dakota for leasing of space for placement of vending and video lottery machines.[20] In support of their conspiracy theory, plaintiffs allege that around May of 1989, before video lottery commenced in South Dakota, MVA members met at a

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[17] Id. at ¶ 33.

[18] See First Amended Complaint at X (Prayer for Relief).

[19] See PSMF at ¶ 68 (citing PSMF, Tab 27 (Affidavit of James M. Cremer (Aug. 13, 1996)).

[20] See PSMF at ¶ 1 (citing PSMF, Tab 1 (Affidavit of Bill Welk (Aug. 12, 1996)).

location styled the "Goose Camp"[21] to discuss the areas in which each member would conduct its video lottery business.[22] Plaintiffs further allege that defendants utilized MVA meetings both to enforce and to further the ends of the conspiracy in the following manner:

(1) Defendants used MVA meetings to discuss formalization of their agreement through a "code of ethics" to "help govern actions of all fellow operators and that all association members must abide by such."

(2) Defendants imposed a two-year probation status on new "MVA" members to ensure that the new member lived up to the terms of the conspiracy.

(3) Defendant operators utilized their separately controlled pool and dart tournament corporation as an additional means of enforcing the conspiracy by threatening to deny eligibility to participate in this highly desirable corporation to new MVA members that did not comply with the terms of the conspiracy.

(4) At MVA meetings, defendants discussed both their territorial allocation and their agreement not to compete on price.[23]

[¶23] In furtherance of the conspiracy, plaintiffs allege that MVA members agreed not to service each other's accounts or

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[21] The "Goose Camp" appears to be a group of hunting cabins near Gettysburg, South Dakota, owned by Jim Koehler, Tim Hofer, and Jack Theeler. See PSMF, Tab 1 at ¶ 11.

[22] See PSMF at ¶ 7 (citing PSMF, Tab 1 (Affidavit of Bill Welk (Aug. 12, 1996)).

[23] See PSMF at ¶ 63.

attempt to obtain an account belonging to another MVA member. If an MVA member's account contacted another MVA member the protocol was for the contacted MVA member to inform the account owner of the contact and give the account owner the opportunity to save the account. If an account belonging to an MVA member attempted to order VLCs, VLT also contacted the MVA member to inform the account owner of the contact to provide the account owner the additional opportunity to save his account. While MVA members would compete on new accounts and pursue accounts of non-MVA members, members would not try to take existing accounts from another MVA member.

[¶24] Plaintiffs contend that VLT agreed to adhere to MVA's territorial allocations for two reasons. First, MVA provided early support for VLT to obtain VLT's approval in South Dakota as the first video lottery manufacturer. Second, plaintiffs contend that VLT agreed to the MVA's territorial allocations because MVA had the power to ruin VLT's reputation with the national Amusement Association by representing that VLT does not support Association members.[24]

[¶25] 2. Refusal to Deal

[¶26] During the initial period of video lottery start-up, VLT struggled to meet the market demands and production orders were often delayed. It is undisputed that VLT sold its VLC video lottery machines to members and non-members of the MVA.[25] However, plaintiffs contend that VLT usually only sold VLCs to non-MVA members when a non-MVA member had its attorney contact VLT or the non-MVA member

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[24] See PSMF at 19 (citing PSMF, Tab 8 at 6).

[25] See DSMF at ¶ 37 (citing DSMF, Tab 3 (First Affidavit of Jean L. Koepke)).

threatened to sue VLT. While VLT would often inform class member plaintiffs that there were no VLCs available, MVA members would obtain VLCs with little delay. Plaintiffs contend that VLT's sales policy of selling equipment only to what VLT considered to be qualified coin operating companies that had experience and background in the business was merely a sham, designed to cover up the fact that VLT had agreed to sell only to MVA members supporting VLT's application to become the first approved video lottery machine manufacturer in South Dakota.

[¶27] The following figure illustrates the numerical breakdown by percentage of VLC machines sold prior to and after the September 16, 1993, video lottery study committee hearing to: (1) MVA members; (2) purchasers approved by MVA and VLT; (3) purchasers who threatened to take legal action against VLT for refusing to sell; and (4) non-MVA members. See Plaintiffs' Response to Defendants' Statement of Material Facts at ¶ 37 [hereinafter "PRDSMF at ¶ __"]. See also PSMF, Tab 27 at 2-3 (Affidavit of James M. Cremer (August 13, 1996) (filed under seal)). Submissions by defendants indicate the following number of machine sales to MVA and non-MVA members:

YEAR	NON-MVA MEMBERS	MVA MEMBERS
1989	166	929
1990	423	1378
1991	345	1046
1992	202	452
1993	**432**	**836**
1994	**636**	**350**

See Second Affidavit of Jean L. Koepke at ¶13, Exhibit B (August 27, 1996) (filed under seal) (altering the numbers provided in the First Affidavit of Jean L. Koepke at ¶ 6 (DSMF, Tab 3) (emphasis added)).

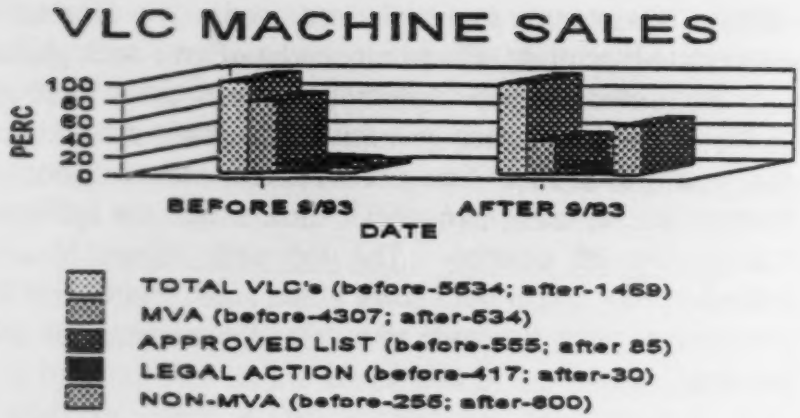

Figure 1

[¶28] 3. Price Fixing

[¶29] It is undisputed that there is no evidence of predatory pricing by the operator defendants in regard to lease prices or in the prices charged by VLT for its machines to operators.[26] Rather, plaintiffs contend that the inability to obtain VLCs has permitted the lease splits to be high in defendant operators' favor. Plaintiffs allege that MVA operators agreed with each other and VLT to fix the price of supplying VLCs to licensed establishments. The allegation stems from the proposed form contract supplied to MVA members from Mac Hasvold, which suggested a 40/60 profit split, establishments receiving 40 percent with operators receiving 60 percent. The allegation is that the suggested split served as an artificial starting point, and operator defendants ultimately utilized a 50/50 split for the majority of customers and that defendant operators agreed with VLT not to permit VLCs to be resold to establishments or to place machines at overly generous splits to licensed establishments. Plaintiffs allege that the VLT characterized splits deviated too much from the agreed upon 50/50 split as

[26] See PRDSMF at ¶ 25.

splits "tantamount to sale" and actively enforced the agreement by cutting off operators who offered such generous splits until said operators agreed to conform to the 50/50 split. [¶30] Plaintiffs contend that this 50/50 profit split remained the norm until the lottery committee's investigation and hearing on September 16, 1993, after which the splits were reduced by 20 percent. The following figure illustrates defendant MVA operator's share of net video lottery profits by percentage prior to and after the September 16, 1993, hearing.[27]

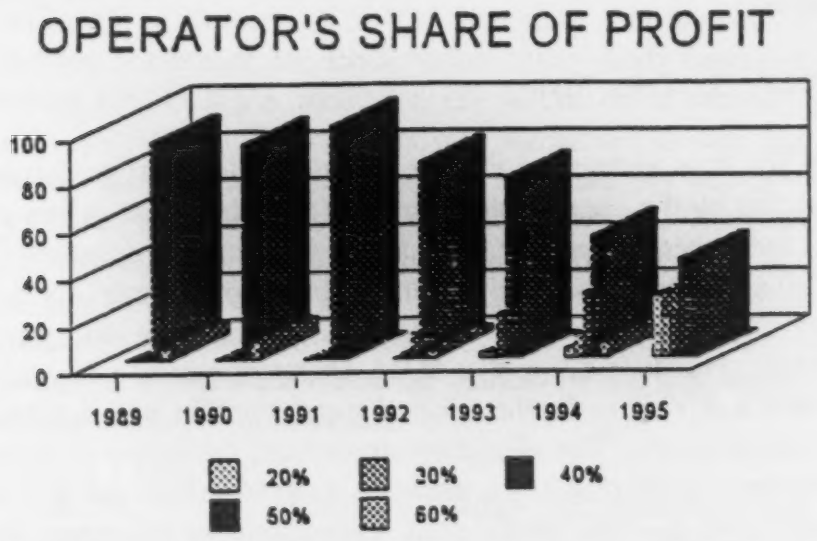

Figure 2

SUMMARY JUDGMENT STANDARD

[¶31] Under Rule 56(c) of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a

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[27] See PSMF, Tab 2 at Ex. 10 (Affidavit of James M. Cremer (August 12, 1996) (filed under seal)).

matter of law." In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

[¶32] In determining whether a genuine issue of material fact exists, the Court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The Supreme Court has instructed that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," Matsushita, 106 S. Ct. at 1356, and "[w]here the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Id.

[¶33] Where there has been ample opportunity for discovery, summary judgment is appropriate in antitrust litigation just as in any other litigation upon a showing by the moving party of an absence of any genuine issue of material fact. Willmar Poultry Co. v. Morton-Norwich Prod., Inc., 520 F.2d 289 (8th Cir. 1975), cert. denied, 424 U.S. 915, 96 S. Ct. 1116, 47 L.

Ed. 2d 320 (1976). This action was commenced on June 7, 1994. The file comprises 404 entries in ten files. There have been over two dozen depositions of the parties and witnesses taken. Ample time for discovery has passed.

[¶34] The parties quarrel over the application of Matsushita. The teaching of Matsushita was further articulated by the Supreme Court in Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468,112 S. Ct. 2072, 2083 (1992) where the Court said, "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." The Court expounded on this notion by reiterating its conclusion in Anderson that, "[s]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Eastman Kodak, 504 U.S. at 468 n. 14, 112 S. Ct. 2083 n.14 (quoting Anderson, 477 U.S. at 248, 106 S. Ct. at 2510). To survive summary judgment there must be evidence that "reasonably tends to prove" plaintiffs' theory; defendants meet the burden under Fed. R. Civ. P. 56(c) when it is conclusively shown that the facts upon which the nonmoving party relied to support the allegations were not susceptible of the interpretation which was sought to give them; only reasonable inferences can be drawn from the evidence in favor of the nonmoving party; and the Court must consider whether the inference of conspiracy is reasonable. Id. (citations omitted).

[¶35] Plaintiffs' response in opposition to defendants' motion for summary judgment invites the Court to apply Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970) and Poller v. Columbia Broadcasting, Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458, 488

(1962), as a standard for summary judgment.[28] See Docket #374. The Court declines the invitation. Plaintiffs' reliance upon Poller and Adickes runs counter to the teachings of Celotex, Anderson, and Matsushita. These cases disagreed with the idea that summary judgment is to be used sparingly. Plaintiffs fail to cite First National Bank v. Cities Serv. Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968), an antitrust case decided by the Supreme Court six years after Poller, where the Court set forth that:

> [T]o the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

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[28] During oral arguments on the motion for summary judgment, plaintiffs also made the argument that a nonmoving party's burden under the standard for evaluating summary judgment is lower than that of a nonmoving party defending against a motion for directed verdict. Such an inference is clearly misplaced. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986) ("If the defendant in a . . . civil case moves for summary judgment or for a directed verdict . . . , [the inquiry is] whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict").

Id. 391 U.S. at 289-90, 88 S. Ct. at 1593. This case has been interpreted to soften Poller by rejecting the view that summary judgment "should, in effect, be read out of antitrust cases." See William W. Schwarzer, Alan Hirsch, and David J. Barrans, The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure, Federal Judicial Center, at 4 (1991).

[¶36] The clear example of the use of summary judgment in an antitrust case is Matsushita, involving a conspiracy to fix prices, in which summary judgment was affirmed for defendants. Finally, should there remain any doubt as to whether the courts continue to harbor any antagonstic feeling toward resolution of summary judgment motions in antitrust cases, Chief Justice Arnold in City of Mt. Pleasant, Iowa v. Associated Electric Co-op, Inc., 838 F.2d 268 (8th Cir. 1988) laid such thoughts to rest. He stated that, "a trilogy of recent Supreme Court opinions demonstrates that we should be somewhat more hospitable to summary judgment than in the past. The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact." Id. at 273.

[¶37] Based on the foregoing, the trilogy of Celotex, Anderson, and Matsushita provide the Court with a methodology in analyzing defendants' motion for summary judgment. See generally 1 Steven A. Childress & Martha S. Davis, Federal Standards of Review § 5.04 (2d ed. 1991) (discussing the standards for granting summary judgment that have emerged from Matsushita, Celotex, and Anderson). Under this trilogy, it is incumbent upon the nonmoving party (plaintiffs), based upon the showing set forth by the moving parry (defendants), to establish significant probative evidence to prevent summary judgment. See Terry A. Lambert

Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 979 (8th Cir. 1991).

[¶38] Plaintiffs have been unable to sustain their burden in the face of defendants' showing. Plaintiffs' conspiracy allegations are based solely upon surmise, conjecture, and conclusions from unsupported facts.

DISCUSSION

[¶39] Section 1 of the Sherman Act proscribes "(e)very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. A successful claim under Section 1 of the Sherman Act requires proof of three elements: (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury. E.S. Dev., Inc. v. RWM Enter., Inc., 939 F.2d 547, 553, 556 (8th Cir. 1991); Rosebrough Monument Co. v. Memorial Park Cemetery, 666 F.2d 1130, 1138 (8th Cir. 1981). See also Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (citing Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1158 (5th Cir. 1992), *cert. denied sub nom.* Dillard v. Security Pacific Corp., 506 U.S. 1079, 113 S. Ct. 1046, 122 L. Ed. 2d 355; Wilder Enter., Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 n. 1 (4th Cir. 1980); Ernest W. Hahn, Inc. v. Codding, 615 F.2d 830, 844 (9th Cir. 1980); *cf.* Matsushita, 475 U.S. at 586, 106 S. Ct. at 1356). Plaintiffs' proof fails to establish the first element of their antitrust claim.

[¶40] An antitrust plaintiff is not required to prove the existence of a formal agreement among defendants to establish a combination or conspiracy. E.S. Dev., Inc., 939 F.2d at 553 (citing Reed Bros., Inc. v. Monsanto Co., 525 F.2d 486, 495 (8th Cir. 1975), *cert. denied*, 423 U.S. 1055, 96 S. Ct. 787, 46 L. Ed. 2d 645 (1976)). "Indeed, it is axiomatic that the typical

conspiracy is 'rarely evidenced by explicit agreements,' but must almost always be proved by 'inferences that may be drawn from the behavior of the alleged conspirators.'" E.S. Dev., Inc., 939 F.2d at 553, 554 (citing H.L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981); Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885, 97 S. Ct. 236, 50 L. Ed. 2d 166 (1976)), *cert. denied*, 459 U.S. 880, 103 S. Ct. 176, 74 L. Ed. 2d 144 (1982)). Furthermore, "an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to 'warrant a . . . finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement.'" E.S. Dev. Inc., 939 F.2d at 554 (citing, American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946), quoted in H.L. Moore Drug, 662 F.2d at 941; Cheatham's Furniture Co. v. La-Z-Boy Chair Co., 728 F. Supp. 569, 571 (E.D. Mo. 1989), *aff'd*, 923 F.2d 858 (8th Cir. 1990); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). However, even though all evidence and reasonable inferences are to be viewed in the light most favorable to plaintiffs, the nonmoving party, "the range of permissible inferences from ambiguous evidence is limited in a section one case." Lovett v. General Motors Corp., 998 F.2d 575, 578 (8th Cir. 1993) (citing Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356). Stated somewhat differently, "(c)onduct that is consistent with permissible competition as with illegal conspiracy, does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 688, 106 S. Ct. at 1356 (citations omitted) (emphasis added). VLT's statement through Larry Lippon pertaining to the desire to present the VLC product in the most alluring fashion

establishes a legitimate factual reason for its policy of selling only to selected operators.

[¶41] In considering a summary judgment motion, the Court must consider only the evidence that is admissible at trial in determining whether the evidence is sufficient to enable a reasonable jury to conclude that a combination or conspiracy did exist, keeping in mind that all evidence and reasonable inferences are to be viewed in the light most favorable to plaintiffs as the nonmoving party. Walker v. Wayne County, Iowa, 850 F.2d 433, 434 (8th Cir. 1988); Multi-Tech Systems v. Hayes Microcomputer Prod. Inc., 800 F. Supp. 825, 844 (D. Minn. 1992). See generally Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313, 1319 (8th Cir. 1986) (citing Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 924 (2d Cir. 1985) ("[w]ithout a showing that admissible evidence will be available at trial, a party may not rely on inadmissible hearsay in opposing a motion for summary judgment.")).

[¶42] Pursuant to Federal Rule of Evidence 801(d)(2)(E),[29] plaintiffs, the party offering the hearsay evidence, must prove "by a preponderance of the evidence that a conspiracy existed to which the declarant and the defendant were parties and that the statements were made in furtherance of the conspiracy." United States v. Mitchell, 31 F.3d 628, 631 (8th Cir. 1994) (citing Bourjaily v. United States, 483 U.S. 171, 175-76, 107 S. Ct. 2775, 2778-79, 97 L. Ed. 2d. 144 (1987) (when the preliminary facts relevant to determining whether a statement is admissible under the co-conspirator exception to the hearsay rule are disputed, the party offering the statement has the burden to prove them by a preponderance of the evidence)). Consistent with this methodology, the Court has analyzed plaintiffs' circumstantial evidence and finds that plaintiffs'

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[29] Statements are not hearsay when made by a co-conspirator during the course of and in furtherance of the conspiracy.

evidence fails to support the existence of a conspiracy, and assuming without conceding that a conspiracy existed, the statements were not made "in furtherance" of the conspiracy.

[¶43] At oral argument, plaintiffs acknowledged that they are strictly relying on circumstantial evidence to support their conspiracy theory. The circumstantial evidence produced by plaintiffs in support of their conspiracy theory for the most part consists of: (1) Bill Welk's affidavit setting forth the "Goose Camp" allegations (Affidavit of Bill Welk (Aug. 12, 1996), PSMF, Tab 1); (2) various clandestinely taped conversations, which specifically include: (a) the March 25, 1993, and July 8, 1993, conversations between defendant Jim Koehler of Hub Music and plaintiff Chuck Huber of G & T Gaming,[30] (b) the April 16, 1993, May 4, 1993, and August 30, 1993, conversations between former VLT employee Dana Waggener and plaintiff Chuck Huber,[31] and (c) the May 19, 1993, conversation between James Trucano, the brother of defendant Michael Trucano, and plaintiffs Chuck Huber and David Wisdom of G & T Gaming;[32] (3) demonstrative evidence of "conscious parallelism."

[¶44] A. Alleged Goose Camp Meeting

[¶45] The only submission concerning the alleged "Goose Camp" meeting is the Bill Welk affidavit. See PSMF, Tab 1 (Affidavit of Bill Welk (Aug. 12, 1996)). Although the Welk affidavit could be stricken on procedural grounds for failure to timely disclose, a more appropriate substantive basis exists.

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[30] See PSMF, Tab 3 (Transcript of taped conversation, Koehler/Huber (March 25, 1993)); PSMF, Tab 7 (Transcript of taped conversation, Koehler/Huber (July 8, 1993)).

[31] See PSMF, Tabs 4, 5, and 8.

[32] See PSMF, Tab 6 at 3-4 (Transcript of taped conversation, James Trucano (May 19, 1993)

According to Welk, he and defendant Jim Koehler were in a motel development partnership starting in 1989, which was later dissolved in October of 1991. Id. at ¶¶ 4, 5. He states that in or about May of 1989 he traveled with Koehler to a motel site to extend an offer on land upon which they built a Super 8 Motel that summer. Id. at ¶ 6. He further states in rather explicit detail that the two met in the morning at approximately 7 a.m. at which time Koehler allegedly informed Welk that he had been at a meeting at "'Goose Camp" with members of the MVA for the purpose of discussing territorial allocations. Id. at ¶¶ 7-13. The undisputed evidence submitted by defendants unequivocally proves that the business relationship between Welk and Koehler did not even commence until January 19, 1990, and the construction of the cabin at the "Goose Camp" was not commenced until August 1989 and was not finished until the fall of 1989 when it would have been too late to allocate territories in light of the fact that the majority of the lease arrangements at issue had already been completed. See Docket #380. Thus, the Welk allegations pose a factual impossibility and thereby fail to raise any genuine issue of material fact.[33]

[¶46] B. Alleged Surreptitiously Taped Conversations (Jim Koehler, Dana Waggener, and James Trucano)

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[33] The Court notes that on September 12, 1996, plaintiffs submitted a second affidavit from Welk which recognized the problem associated with the timing of events described in the first Welk affidavit. See Docket #398. Both the defendants and the Court anticipated the forthcoming of a third Welk affidavit to shed light on the predicament; however, at oral argument plaintiffs indicated that there is no third Welk affidavit. The time for discovery has long passed, and the Court must evaluate the evidence before it in determining whether plaintiffs have set forth sufficient evidence in support of their conspiracy theory.

[¶47] Jim Trucano left South Dakota in early 1988, prior to video lottery start-up in 1989, and was not even tangentially involved with the process or with VLT. See Docket #379, Tab Q; Docket #380 at 21-22; Jim Trucano Deposition at 29:4 to 37:24, 42:5 to 44:16, 46:21 to 52:2, 55:16-18, 56:6 to 60:16, 62:2 to 63:2, 75:8 to 77:11 (containing Jim Trucano's disavowal's of personal knowledge). Plaintiffs have failed to produce probative evidence that Jim Trucano was either a co-conspirator or that any statements made were in furtherance of the alleged conspiracy. Mitchell, 31 F.3d at 631; Bourjaily, 483 U.S. at 175-76, 107 S. Ct. at 2778-79.

[¶48] At the time Dana Waggener made his statements he was an employee of Williams Electronics, a competitor of VLT. See Docket #380 at 19. He was attempting to sell Williams Electronics' products to Chuck Huber of G & T Gaming; thus, Waggener clearly was not advancing VLT's objective. Thus it cannot be said he was acting in furtherance of any antitrust conspiracy.[34] See United States v. DeLuna, 763 F.2d 897, 909 (8th Cir. 1985). In any event, the transcripts of the conversations along with the other evidence contained in the record fail to present a genuine material issue of fact upon which a reasonable jury could infer the existence of a conspiracy.[35]

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[34] In addition, the statements lack sufficient indicia of trustworthiness to warrant their introduction under the discretionary exceptions to the hearsay rule. See Fed. R. Evid. 803(24) and 804(b)(5).

[35] The Court is aware of the Eighth Circuit decision of United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), wherein the Eighth Circuit instructed that in the appropriate circumstances a district court could admit conditionally "the statements of alleged co-conspirators, subject to an on-the-record ruling that the statement is admissible under the co-conspirator exception to the rule against hearsay." United States v. Ortiz-Martinez, 1 F.3d 662, 673 (8th Cir. 1993) (citing United States v. Coco, 926 F.2d 759, 761 (8th Cir. 1991)). However, in this case such an approach is not warranted in light of the fact that plaintiffs have failed to show by a preponderance of the evidence that the statements were made

[¶49] Finally, Chuck Huber of plaintiff G & T Gaming, Inc. placed two recorded telephone calls to plaintiff James Koehler of Hub Music & Vending. The obvious purpose of the conversations of March 25, 1993, and July 8, 1993, was an attempt to obtain inculpable statements in support of a suspicion of conspiracy. At oral argument plaintiffs urged the Court to find that they are admissible under Federal Rule of Evidence 801(d)(2)(A)-(D), admission by party opponent. "An admission of a party opponent may be introduced as evidence against that party opponent only. It is not evidence against any other party in the case." David F. Binder, Hearsay Handbook, 431 (3d ed. 1991). Since the complaint alleges an antitrust conspiracy, if the Koehler statements are admissible under Rule 801(d)(2)(A)-(D), they would not prove a conspiracy since they would only be binding on Koehler and would be hearsay as to all other party defendants unless admitted under Rule 801(d)(2)(E). For the same reason stated as to the failure of the Waggener and Trucano statements to meet the Rule 801(d)(2)(E) test, so also the Koehler statements fail the test of admissibility. The Court has reviewed the various conversation transcripts produced by plaintiffs in support of their conspiracy theory and all other evidence including the deposition exerts supplied by both parties, the Court concludes that said evidence is too ambiguous for a reasonable jury to infer that a combination or conspiracy existed.

See generally Lovett, 998 F.2d at 578; Matsushita, 475 U.S. at 588, 106 S. Ct. at 1356.

[¶50] In support of their price-fixing theory, plaintiffs contend that Mac Hasvold circulated a proposed form contract supplied to MVA members, which suggested a 40/60

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by co-conspirators in furtherance of a conspiracy, or that said statements along with other evidence of record comprise of evidence upon which a reasonable jury could infer the existence of a conspiracy.

profit split, establishments receiving 40 percent with operators receiving 60 percent.[36] See PSMF at ¶ 25 (citing PSMF, Tab 23 at 64, 65). A determination of whether it is reasonable to infer from the evidence that this form contract served as an artificial starting point for a conspiracy to implement a 50/50 split for the majority of customers requires additional inquiry into the record. First, the operator plaintiffs, including G & T Gaming, Foley, and Remacle, also negotiated 50/50 lease splits with establishments. See DSMF, Tab 13 at 22:13-19 (Joseph Foley Deposition); Tab 15 at 42:4-43:7 (Charles Huber Deposition); Tab 23 at 130:9-131:6 (Robert Remacle Deposition). Moreover, prior to video lottery start-up, the operator defendants historically maintained a 50/50 profit split range with establishments for machines other than video lottery machines. See DSMF, Tab 31 at 102:1-12 (David Backlund Deposition), Tab 33 at 31:2-15 (Leo Freidel Deposition), Tab 34 at 14:8-18 (Lloyd Freidel Deposition), Tab 35 at 39:12 to 40:7 (Elroy Gruenewald Deposition), Tab

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[36] In his affidavit, Hasvold states that:

> I obtained sample copies of written service agreements from other business located all over the country. I used copies of such agreement to write a draft. I took this draft to the attorney for Hasvold Vending. The attorney for Hasvold Vending made changes in the draft and put the Hasvold Vending agreements into final form. Hasvold Vending then used this written agreement in 1989 to sign up video lottery accounts. . . . I did not tell [plaintiffs attorneys] that I individually, or on behalf of the MVA, supplied MVA members generally with a proposed form contract, or that I supplied such a form contract to anyone with suggested splits of 40/60 (40% to establishment and 60% to operator) or any split. . . . I supplied copies of any of these forms in blank to other operators if they requested the same from me.

See DSMF, Tab 29 at ¶¶ 8, 10, 11 (Affidavit of Mac Hasvold (Aug. 22, 1996)).

36 at 64:20 to 65:8 (Timothy Hofer Deposition), Tab 46 at 68:2-13 (Michael Trucano Deposition).

[¶51] In further support of their price-fixing theory, plaintiffs have submitted evidence that a 50/50 split remained the norm for the majority of the operator defendants until the lottery committee's investigation and hearing on September 16, 1993, after which the splits were reduced by 20 percent. See Figure 2 (illustrating defendant MVA operator's share of net video lottery profits by percentage prior to and after the September 16, 1993, video lottery committee hearing); PSMF, Tab 2 at Ex. 10 (Affidavit of James M. Cremer (August 12, 1996)). As defined by the Eleventh Circuit, "(c)onscious parallelism is uniform business conduct by competitors that permits a court to infer the existence of a conspiracy between these competitors." Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991) (citing Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221, 59 S. Ct. 467, 472, 83 L. Ed. 610 (1939)). Proof of parallel business behavior alone is insufficient to establish a conspiracy. Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 259 (1954). As further explained by the Eleventh Circuit,

> The idea behind this theory is that competitors' parallel business decisions are probative of the existence of a conspiracy between these competitors. The evidence used to support this theory is circumstantial. To ensure that we do not punish unilateral conduct, however, we require more than mere evidence of parallel conduct by competitors to support an inference of a conspiracy; an agreement is properly inferred from conscious parallelism only when "plus factors" exist.

Todorov, 921 F.2d at 1456 n.30. These "plus factors" include actions contrary to the defendants' economic interests and a motivation to enter into such an agreement. Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1242 (3d Cir.), *cert denied*, 510 U.S. 994 (1993). See generally Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978). Plaintiffs have failed to produce probative evidence relating to the existence of these plus factors.[37]

[¶52] Plaintiffs have also provided a demonstrative chart of the territorial allocations derived from the alleged conspiracy. See PSMF, Tab 26 (Affidavit of James M. Cremer, Ex. 9 (August 12, 1996)). It is undisputed that the operator defendants had historically established service routes through prior lease arrangements with establishments for machines other than video lottery machines, based on economic and

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[37] As previously discussed, the 50/50 profit split was historically in action prior to the start-up of video lottery for other machines. Furthermore, the operator profit reduction merely reflects economic factors. The record indicates that the majority of the operator/establishment contracts initially entered into in 1989 were for a five-year term. As the expiration dates approached, the success of the industry had become apparent and new arrangements were negotiated to reflect conditions existing at that time. The gradual increase in the state's share of the video lottery revenue from 22.5 percent at start-up, to the present 50 percent share, played a role in the split reduction. The history of percentage revenue shares to the state of South Dakota is: 22.5 percent from October 1989 to December 1990; 25 percent from January 1991 to December 1991; 35 percent from January 1992 to June 1993; 36 percent from July 1, 1993 to June 1994; 37 percent from July 1, 1994 to June 1995; and 50 percent from July 1, 1995 to present. Finally, as the success of video lottery became apparent, high volume establishments recognized the value of their customer base and demanded higher percentages of the total split, which operators were willing to renegotiate.

geographic concerns.[38] Furthermore, it is also undisputed that at video lottery start-up, the operator defendants ordered a variety of video lottery machines from various manufacturers and distributors, not restricting their video lottery machine orders to only VLC machines.[39] Plaintiffs have failed to produce probative evidence to combat defendants showing that there was no conspiracy to allocate territories as to prevent summary judgment on that issue.

[¶53] On the refusal to deal issue, both parties have produced numerical data on the breakdown by percentage of VLC machines sold to MVA and non-MVA members. See Figure 1 and accompanying footnote (VLC Machine Sales). Furthermore, it is undisputed that Larry Lippon developed a sales policy prior to video lottery start-up while manufacturing and selling video devices for the Montana market in which he would only sell his equipment to qualified coin operating companies that had experience and background in the amusement and vending business.[40] One of VLT's rationales for choosing qualified operators to place, service, and maintain its equipment included a desire to present the VLC product in the most desirable possible way to both the ultimate user as well as the purchaser of the equipment.[41] A unilateral refusal to deal is no Sherman Act violation. Monsanto, 465 U.S. at 761, 104 S. Ct. at 1469 (citing United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992

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[38] See DSMF at ¶¶ 30, 31 (citing DSMF, Tab 7; DSMF, Tab 8 at 71:5-14; DSMF, Tab 18 at 11:8-21 (Deposition of James Koehler)). See also PSMF, Tab 1 at ¶ 9.

[39] See DSMF at ¶¶ 22, 48, 52, 58, 62, 63, 69, and 70.

[40] See DSMF at ¶35 (citing DSMF, Tab 19 at 64:16 to 69:21; 97:13 to 99:22; DSMF, Tab 11 (Deposition of Leo Freidel); DSMF, Tab 2 at 5-7).

[41] See DSMF at ¶36 (citing DSMF, Tab 19 at 64:16 to 67:3; DSMF, Tab 11).

(1919) (noting that a manufacturer has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently)); Terry's Floor Fashions v. Burlington Indust., 763 F.2d 604, 610-11 (4th Cir. 1985); Aquachem Vo., Inc. v. Olin Corp., 699 F.2d 516, 520 (11th Cir. 1983). Furthermore, evidence of meetings alone is not sufficient to support a conspiracy. Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074, 97 S. Ct. 813, 50 L. Ed. 2d 792 (1977). Plaintiffs have failed to produce probative evidence to combat defendants' showing that there was no combination or conspiracy on defendants part to refuse sale of VLCs to non-MVA members as to prevent summary judgment on that issue.

[¶54] Because the Court finds that all defendants are entitled to summary judgment based on plaintiffs failure to produce sufficient probative evidence that a combination or conspiracy existed between defendants, the Court need not inquire into the standards for evaluating whether the alleged restraint of trade is unreasonable. Likewise, the Court will not resolve the standing, state action doctrine, statute of limitations, doctrine of estoppel and waiver defense issues raised in defendants' motion for summary judgment.

CONCLUSION

[¶55] After viewing the arguments presented by both parties and after reviewing the facts and inferences that may be derived therefrom in a light most favorable to the plaintiffs, this Court concludes that plaintiffs have failed to present sufficient probative evidence in support of their conspiracy theory as to create a genuine issue of material fact to withstand defendants motion for summary judgment. Accordingly, judgment shall be issued forthwith.

Dated November 6, 1996.

BY THE COURT:

/S/
RICHARD H. BATTEY
CHIEF JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-4208SDRC

Corner Pocket of Sioux Falls, et al.,	*	
Appellants,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
Video Lottery Technologies, Inc., et al.,	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 29, 1997

Order Entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit